

1 (ALJ), which was held on July 16, 2008, before ALJ Robert S.
2 Chester. (Tr. 191-201.) Plaintiff, who was represented by counsel,
3 failed to appear. For good cause shown, the hearing was rescheduled
4 for November 17, 2008. (Tr. 53.) Plaintiff and vocational expert
5 T. Moreland (VE) testified. (Tr. 202-23.) The ALJ denied benefits
6 on November 27, 2007, and the Appeals Council denied review. (Tr.
7 17-26, 4-6.) The instant matter is before this court pursuant to 42
8 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript
11 of proceedings, and are briefly summarized here. At the time of the
12 hearing, Plaintiff was 42 years old. (Tr. 211.) He had an eleventh
13 grade education, (Tr. 121), and past work experience as a computer
14 mechanic repairer, a bindery machine operator, and a telemarketer.
15 (Tr. 215.) His right leg was amputated after a vehicle accident in
16 1986. He received social security disability benefits from 1987
17 until 1990 due to his right leg amputation. (Tr. 207.) He
18 voluntarily went to work, and benefits were terminated. He quit his
19 job in 2003. (Tr. 207.) He testified he could not work now because
20 he could no longer do activities he did in the past. (Tr. 208.) He
21 stated he did not use a prosthesis because he could not afford one.
22 (Tr. 209.)

23 **ADMINISTRATIVE DECISION**

24 At step one, ALJ Chester found Plaintiff had not engaged in
25 substantial gainful activity since the alleged onset date. (Tr.
26 22.) At step two, he found Plaintiff had the severe impairment of
27 above the knee right leg amputation, and non-severe mental
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1 impairments and non-severe neck pain. (Tr. 22-23.) At step three,
2 the ALJ determined Plaintiff's impairments, alone and in
3 combination, did not meet or medically equal an impairment in 20
4 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings), section
5 1.05B (Amputation for any cause). (Tr. 23.) At step four, he
6 determined Plaintiff had the residual functional capacity (RFC) to
7 perform light work, except he could only lift 10 pounds and
8 "occasionally climb ramps and stairs, stoop, crouch, or crawl, and
9 never climb ladders, ropes, or scaffolds. He should also avoid
10 concentrated exposure to fumes, dust, and gases." (Tr. 23-24.)
11 After summarizing Plaintiff's testimony, the ALJ found his
12 statements were not credible to the extent they were inconsistent
13 with the RFC findings. (Tr. 24.) Considering VE testimony, ALJ
14 Chester determined Plaintiff was able to perform his past relevant
15 work as a telemarketer. He concluded Plaintiff was not under a
16 "disability" as defined by the Social Security Act at any time
17 through the date of his decision. (Tr. 26.)

18 STANDARD OF REVIEW

19 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
20 court set out the standard of review:

21 A district court's order upholding the Commissioner's
22 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
23 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
24 Commissioner may be reversed only if it is not supported
25 by substantial evidence or if it is based on legal error.
26 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
27 Substantial evidence is defined as being more than a mere
28 scintilla, but less than a preponderance. *Id.* at 1098.
Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to
support a conclusion. *Richardson v. Perales*, 402 U.S.
389, 401 (1971). If the evidence is susceptible to more
than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner.

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

7 SEQUENTIAL PROCESS

8 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
9 requirements necessary to establish disability:

0 Under the Social Security Act, individuals who are
1 "under a disability" are eligible to receive benefits. 42
2 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
3 medically determinable physical or mental impairment"
4 which prevents one from engaging "in any substantial
5 gainful activity" and is expected to result in death or
6 last "for a continuous period of not less than 12 months."
7 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
8 from "anatomical, physiological, or psychological
9 abnormalities which are demonstrable by medically
acceptable clinical and laboratory diagnostic techniques."
42 U.S.C. § 423(d)(3). The Act also provides that a
claimant will be eligible for benefits only if his
impairments "are of such severity that he is not only
unable to do his previous work but cannot, considering his
age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

7 It is the role of the trier of fact, not this court, to resolve

1 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
2 supports more than one rational interpretation, the court may not
3 substitute its judgment for that of the Commissioner. *Tackett*, 180
4 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
5 Nevertheless, a decision supported by substantial evidence will
6 still be set aside if the proper legal standards were not applied in
7 weighing the evidence and making the decision. *Browner v. Secretary*
8 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
9 there is substantial evidence to support the administrative
10 findings, or if there is conflicting evidence that will support a
11 finding of either disability or non-disability, the finding of the
12 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
13 1230 (9th Cir. 1987).

14 ISSUES

15 The question is whether the ALJ's decision is supported by
16 substantial evidence and free of legal error. Plaintiff argues the
17 ALJ erred at step three when: (1) he found Plaintiff did not meet or
18 equal the criteria in Listing 1.05B; and (2) he failed to call a
19 medical expert to opine on equivalency. (Ct. Rec. 10, Memorandum in
20 Support of Summary Judgment, at 4-6.)

21 DISCUSSION

22 At step three of the sequential evaluation, the Commissioner
23 must determine if Plaintiff's severe impairments, alone and in
24 combination, meet or equal a Listing. The Listings were promulgated
25 by the Commissioner to describe various illnesses and abnormalities,
26 categorized by the various body systems, that are considered severe
27 enough to prevent substantial gainful activity "regardless of age,
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1 education or work experience." 20 C.F.R. § 404.1525; *Sullivan v.*
2 *Zebley*, 493 U.S. 521, 529-30 (1990). The claimant has the burden of
3 proof at step three. *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir.
4 1995). To show he meets a Listing, the claimant must establish that
5 he meets each criterion of the listed impairment relevant to his
6 claim. *Sullivan*, 493 U.S. at 531. If a claimant's impairments do
7 not meet the Listing exactly, a finding of "disabled" may be
8 appropriate if his impairments in combination "equal" a Listing. To
9 prove that he "equals" a Listing, "a claimant must establish
10 symptoms, signs and laboratory findings 'at least equal in severity
11 and duration' to the characteristics of a relevant listed
12 impairment." *Tackett*, 180 F.3d at 1099 (quoting 20 C.F.R. §
13 404.1526). That is to say, evidence of other significant objective
14 medical findings, along with a cogent argument, must be presented to
15 raise presumption of disability through equivalency at step three.
16 *Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001). Absent significant
17 medical evidence of the requisite criteria and a plausible theory,
18 the ALJ is not required to explain why equivalency is not
19 established. *Gonzalez v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir.
20 1990).

21 **A. Listing 1.05B**

22 Plaintiff contends the medical evidence establishes the
23 criteria in Listing 1.05B, which requires an amputation, due to any
24 cause, of: "[o]ne or both lower extremities at or above the tarsal
25 region, with stump complications resulting in medical inability to
26 use a prosthetic device to ambulate effectively, as defined in
27 1.00B2b, which have lasted for at least 12 months." Although
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1 Plaintiff concedes his amputation has healed and he "does well
2 getting round on crutches with one leg," he asserts he satisfies the
3 Listing requirements, and is eligible for disability benefits,
4 because he does not use a prosthetic device to ambulate. (Ct. Rec.
5 10, *Memorandum* at 5-6.)

6 As found by the ALJ, Plaintiff has an above the knee right leg
7 amputation, "but there no showing that he is unable to use a
8 prosthesis devise to ambulate." (Tr. 23.) The ALJ noted that the
9 record indicates Plaintiff had been able to work, using only
10 crutches, prior to the date his alleged disability began. The ALJ
11 also found Plaintiff stated at the hearing he could not afford a
12 prosthesis, but when he was working, Plaintiff chose not to use a
13 prosthesis. (Tr. 25.) In addition, the ALJ found Plaintiff "had
14 not shown that he has exhausted all community resources to obtain a
15 prosthesis." *Id.* Thus, as found by the ALJ, Plaintiff did not meet
16 his burden to show that his impairment was due to a "medical
17 inability" to wear a prosthesis, as required by the Regulations.
18 This finding is supported by the medical records, the relevant
19 Social Security Regulations, and Plaintiff's testimony.

20 Dr. John Grauke, M.D., reported in October 2005 that Plaintiff
21 had a "well-healed surgical AKA [above knee amputation]." (Tr.
22 162.) In February 2006, physician Christina Bjornstad, M.D.,
23 examined Plaintiff and found no complications with the healed
24 amputation, noting only atrophy in his right thigh. (Tr. 154-58.)
25 Although she opined Plaintiff could not walk without crutches or a
26 walker because he didn't have a prosthesis, she did not opine he was
27 unable to wear a prosthesis for medical reasons. (Tr. 155.)

1 Rather, she reported he could move short distances with his
2 crutches, and "if he got a prosthesis that worked, this would also
3 be useful for short distances." (*Id.*) Regarding his ability to
4 perform other work activities, she opined Plaintiff had "good
5 strength and coordination of his hands and would be able to do a job
6 that would be prolonged sitting." *Id.* On March 14, 2006, Social
7 Security examiners determined Plaintiff did not meet Listing 1.05B
8 because there was "no evidence or reason to believe that Mr. Larsen
9 is not able to use a prosthesis," or that he had exhausted all
10 sources of community support for obtaining a prosthesis, including
11 vocational rehabilitation assistance. (Tr. 164.) Plaintiff has not
12 provided evidence to controvert these findings.

13 Plaintiff submitted additional evidence to the Appeals Council
14 after the ALJ's denial of benefits. These records are part of the
15 record on review. *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir.
16 2000). However, remand for consideration by the ALJ is warranted
17 only if the new evidence shows there is a reasonable possibility
18 that it would change the outcome of the ALJ's determination. *Mayes*
19 *v. Massanari*, 276 F.3d 453, 462 (9th Cir. 2001). This is not the
20 case in this matter.

21 The new evidence includes a one-time physical evaluation form
22 signed by Teresa Colley, ARNP, dated October 6, 2008, in which
23 Plaintiff was assessed as "severely limited." (Tr. 10-14.)¹ Ms.
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25 ¹ Although Plaintiff attributes the report to "Dr. Scott
26 Hubbell" (Tr. 9), it appears Mr. Hubbell is a state worker at the
27 Department of Social and Health Services in Spokane, Washington.
28 (Tr. 13.)

1 Colley noted that Plaintiff walked with crutches due to a right leg
2 above knee amputation, and that his "old prosthesis from two years
3 ago . . . doesn't fit." (Tr. 11.) She opined Plaintiff "needs to
4 be fitted for an above the knee prosthesis as soon as possible."
5 (Tr. 13.) She cited no evidence of complications with the
6 amputation or medical inability to use a prosthesis.

7 In addition to the physical evaluation, clinic notes from Ms.
8 Colley dated October 16, 2008, show Plaintiff reported needing state
9 benefits because he had no prosthesis and the old one did not fit.
10 (Tr. 16.) The medical provider noted Plaintiff needed to get off
11 crutches and recommended he be fitted for a prosthesis "as soon as
12 possible." (Tr. 15-16.) It was her opinion that Plaintiff
13 qualified for assistance. (Tr. 16.) The new evidence thus supports
14 the ALJ's finding that Plaintiff is able to use a prosthesis, and
15 does not meet the 1.05B criteria. Because there is no reasonable
16 possibility that the new evidence would change the ALJ's decision,
17 remand for consideration of this evidence is not warranted.

18 Plaintiff testified he did not use a prosthesis because he
19 could not afford it. (Tr. 209.) He could not remember the names of
20 places he had tried to obtain one over the years. (*Id.*) Although
21 the court has ruled a disabled claimant may not be denied benefits
22 because of an inability to pay for treatment, *Gamble v. Chater*, 68
23 F.3d 319, 321 (9th Cir. 1995),² the record shows that when Plaintiff
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25 ² In 2001, the Commissioner revised the Listing 1.10 criteria
26 at issue in *Gamble*. 66 Fed. Reg. 58010-01, available at 2001 WL
27 1453802 (Fed. Reg.). Listing 1.10 was replaced by new Listing 1.05,
28 which includes Listing 1.05B. To meet Listing 1.05B, Plaintiff must

1 was working and had access to medical care, he chose to use
2 crutches. (Tr. 164.) Further, the Commissioner's policy ruling
3 advises that a claimant cannot be found disabled if he fails,
4 without justifiable cause, to follow treatment that would restore
5 his ability to work. *Social Security Ruling (SSR) 82-59*.³ The
6 burden is on Plaintiff to present documentation of his financial
7 circumstances and contacts with reasonably available community
8 resources before inability to pay can be used as a basis for
9 benefits. *Id.* Plaintiff has not met this burden. As discussed
10 above, Ms. Colley and Dr. Bjornstad found no medical problems with
11 his amputation and recommended Plaintiff obtain a prosthesis.
12 Plaintiff has not shown he contacted available community resources
13 prior to seeing Ms. Colley in October 2008, at which time it was
14 recommended he get a prosthesis "as soon as possible," and also was
15 deemed qualified for assistance. The ALJ's finding that Plaintiff
16 did not meet the requirements of Listing 1.05B, is supported by
17 substantial evidence and free of legal error.

18 **B. Equivalency**

19 "At all times, the burden is on claimant to establish [his]
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21 be "medically unable to use a prosthetic device to ambulate
22 effectively." Listing 1.05B. Plaintiff has not met this criterion.

23 ³ Social Security Rulings are issued to clarify the Regulations
24 and policy. They are not published in the federal register and do
25 not have the force of law. However, under the binding precedents,
26 deference is to be given to the Commissioner's interpretation of the
27 Regulations. *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9th Cir. 2005);
28 *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3. (9th Cir. 1991).

entitlement to disability insurance benefits." *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1998). At step three, Plaintiff must provide objective medical evidence and present a theory of how his medically determinable impairments equal a specific Listing. *Tackett*, 180 F.3d at 1099. Plaintiff contends the ALJ should have consulted a medical expert to determine equivalency. (Ct. Rec. 10, *Memorandum* at 4.) However, "[t]he responsibility for determining medical equivalence rests with the Administrative Law Judge or Appeals Council." 20 C.F.R. §§ 404.1526(e), 416.926(e). The Commissioner has ruled that medical expert testimony on the issue of equivalence is required only when the ALJ finds the evidence suggests a "judgment of equivalence may be reasonable." SSR 96-6p.

As discussed above, the record supports the ALJ's determination that Listing 1.05B is not met. A finding of equivalence must be based on alternative significant medical evidence and a plausible theory. *Lewis*, 236 F.3d at 514-15. Plaintiff has presented no evidence or theory to suggest equivalency under Listing 1.05B. Because there is no medical evidence or theory offered, the ALJ was not required to obtain medical expert testimony to opine on equivalency, or explain why equivalency is not established. *Gonzalez*, 914 F.2d at 1201; SSR 96-6p. The ALJ did not err at step three.

C. Sedentary Work

Plaintiff appears to argue he is not capable of sedentary work as found by the ALJ, due to an inability to carry anything when he uses two crutches to walk. (Ct. Rec. 10, *Memorandum* at 6.) Sedentary work involves lifting no more than ten pounds at a time, and occasionally lifting or carrying small objects. It requires an

1 ability to sit for six out of an eight hour day and to walk and
2 stand not more than two hours in an eight hour day. SSR 83-10.
3 Plaintiff's assertion that he is unable to carry anything while on
4 crutches is not supported by the record. The evidence and
5 Plaintiff's testimony indicate he was able to work and carry things
6 when he was on crutches at his prior work as a computer mechanic,
7 bindery machine operator and telemarketer and in his daily
8 activities. (Tr. 149-50, 215.) At the hearing, Plaintiff testified
9 he had been working on his car the week before. (Tr. 208-09.) In
10 his interview with Rebecca Alexander, Ph.D., he reported he helps
11 his mother, with whom he lives, with home improvements, and he is
12 able to cook and do household chores. (Tr. 150.) Further, as
13 discussed above, Plaintiff has failed to present sufficient evidence
14 that he is medically unable to wear a prosthesis, or that he is
15 unable to pay for the recommended prosthesis that would restore his
16 ability to work. Because he has not followed the medical
17 recommendations for treatment, or shown a justifiable cause for his
18 failure to obtain a prosthesis, Plaintiff is not eligible for
19 disability benefits. 20 C.F.R. §§ 404.1530, 416.930; *Warre v.*
20 *Commissioner of Social Sec. Admin.*, 439 F.3d 1001, 1005 (9th Cir.)
21 (impairments that can be controlled with treatment are not
22 disabling).

23 CONCLUSION

24 The Commissioner's determination of non-disability is supported
25 by substantial evidence and free of legal error. Accordingly,

26 IT IS ORDERED:

27 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 10**) is
28 **DENIED;**

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 11**) is **GRANTED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant.

DATED March 30, 2010.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE